Nos. 84-801 and 84-805

Office - Supreme Court, U.S.
FILED
JUN 7 1985
ALEXANDER L. STEVAS
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THOMAS J. O'NEILL, TRUSTEE IN BANKRUPTCY OF QUANTA RESOURCES CORPORATION, Debtor,

Petitioner,

v.

THE CITY OF NEW YORK and STATE OF NEW YORK and THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

MIDLANTIC NATIONAL BANK,

Petitioner,

v.

THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENTS STATE OF NEW YORK AND CITY OF NEW YORK

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Questions Presented

1. Does section 554(a) of the Bankruptcy Code authorize a trustee in bankruptcy to abandon a toxic waste facility which constitutes a present hazard to public health, safety and the environment, in violation of federal, state and local laws?

2. Would an order of the bankruptcy court limiting the trustee's authority to abandon the facility under these circumstances constitute an unlawful taking of the secured creditors' interests (assuming that this issue is ripe for decision)?

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Statement of the Case

This case involves a bankruptcy trustee's negligent post-petition management of a hazardous waste facility in the heart of the nation's largest city. The bankruptcy trustee managing this property took virtually no steps during his administration of the estate to protect the public from leaking chemicals or possible fires; then, after nearly eight months of neglect, he simply decided to abandon the property. New York opposed this effort.

This case also involves the harmonization of important federal and state policies: on the one hand, to protect the health and safety of the American public from the toxic effect of dangerous chemicals by preventing their uncontrolled discharge into the environment, and on the other, by means of federal bankruptcy policy, to provide a fair distribution of a debtor's assets among creditors. The court below carefully accommodated these policies in order to protect the public. This Court should reject the petitioner's attempt to upset that careful balance.

****

Quanta Resources Corporation ("Quanta" or the "debtor") was in the business of collecting, transporting, processing and storing waste oils. *In re Quanta Resources Corp.*, 739 F.2d 912, 913 (3d Cir. 1984) ("*Quanta*") (App. A, 1a, 3a).[1] Quanta owned and operated facilities in Edgewater, New Jersey and in Long Island City in New York City. *Id.* at 913 (App. A, 3a); *In re Quanta Resources Corp.*, 739 F.2d 927, 928 (3d Cir. 1984) (App. B, 37a).[2]

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[1] References to pages in the appendices to the Petition for a Writ of Certiorari are indicated as App. ____, ____. References to pages in the joint appendix in the court below are indicated as J.A. ____.

[2] Before their sale to Quanta, these facilities were operated by companies reportedly controlled by Russell W. Mahler, President of the former Hudson Oil Refining Company, who was convicted of illegal dumping of toxic wastes into abandoned mines in Pennsylvania and sentenced to serve one year in prison and pay a $750,000 fine. Chavez, *Toxic Waste Entrepreneur*, N.Y. Times, May 27, 1982, D 1 at col. 1; Blumenthal, *Accused Polluter Was Paid to Clean Up Sites*, N.Y. Times, May 7, 1982, B 20 at col. 1.

The Long Island City toxic waste facility is located at the geographic center of New York City, *Quanta*, 739 F.2d at 913 (App. A, 3a), and is approximately 450 feet from Newtown Creek, a tributary of the East River, a navigable waterway. More than 500,000 gallons of waste oil, sludge and hazardous waste were being stored on the property; more than 70,000 gallons of these were contaminated with polychlorinated biphenyls (PCB's), an extremely hazardous substance. *Id.* (App. A, 4a); Affidavit of James Reid (J.A. 17-18).

On October 6, 1981, Quanta filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code. *Id.* (App. A, 3a). After filing its petition for reorganization, Quanta continued in the operation of its business and in possession of its property as debtor-in-possession until November 12, 1981. *Id.* At that time, Quanta's reorganization case was converted to a Chapter 7 liquidation case and Thomas J. O'Neill, the petitioner ("trustee"), was appointed trustee. *Id.*

In June of 1982, after nearly eight months of neglect by the trustee, the facility was in a dangerous state of disrepair. *See* Affidavit of Richard Docyk (J.A. 11-13). Some of the storage tanks had holes in them, and some were leaking. *Id.* The system needed by the Fire Department to put out a fire was not in operation, and some of the equipment necessary to make the system effective was missing. Had a fire broken out, the burning waste oil would have generated smoke-laden PCB's, and possibly dioxin, threatening the lives of fire fighters and millions of New York City residents.[3] Affidavit of Dan Levy ("Levy Aff.") (J.A. 19-22).

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[3] When PCB's are burned, heated to high temperatures, or exposed to sunlight, they are oxidized. Oxidized PCB's are much more toxic than the PCB's themselves. Oxidation products include the polychlorinated dibenzo-p-dioxins (commonly called dioxins) and polychlorinated dibenzofurans. There are many isotopes (varieties) of these compounds containing four chlorine atoms which are common oxidation products of PCB's. These tetrachlorodibenzo-p-dioxins (TCDD's) and tetrachlorodibenzofurans (TCBF's) include some of the most toxic compounds known. They are among the most potent carcinogens, teratogens, and liver toxins. Oral doses on the order of a few micrograms (a millionth of a gram) can be lethal. Levy Aff. (J.A. 21).

By notice dated May 25, 1982, the trustee proposed to abandon the Long Island City toxic waste facility on the grounds that the property is "burdensome to the estate, or . . . is of inconsequential value to the estate." 11 U.S.C. § 554(a) (1982). *See Quanta*, 739 F.2d at 913 (App. A, 4a). Assuredly, the facility was not being properly operated when the trustee took over possession and management. Nonetheless, as the City and the State of New York (hereinafter, when referred to collectively, "New York") argued, what the trustee proposed to do by abandonment, after having neglected the facility, created dangers to the public safety and the environment which would not have otherwise existed. Implicitly, by requesting approval to abandon, the trustee was requesting the court to approve the removal of guards and other supervisory personnel who had been placed there because of the dangerous condition of the facility. Previously, the trustee sought to sell components of the partially inoperable fire suppression system. (Notice of Proposed Private Sale by the Trustee, dated May 3, 1982). Additionally, the trustee sought to abandon the half-million gallons of flammable liquids contaminated with highly dangerous PCB's.

Permitting the trustee to abandon the Long Island City facility meant, in the view of New York officals, the further deterioration of the untended facility and the possibility of vandalism. This would substantially increase the possibility of fire or leakage and would seriously endanger the lives and property of New York residents. In addition to the public health problems that would be created, abandonment of the Long Island City facility by the trustee would effectively constitute final disposal of the PCB-contaminated oil and other hazardous wastes on the property because the debtor had been left without any assets.

New York consequently opposed abandonment of the toxic waste facility on the grounds that abandonment would endanger the safety of the public in violation of both federal and state law. *See* Objections to Proposed Abandonment, dated June 4, 1982 (J.A. 3). It asked the bankruptcy court instead to order that assets of the estate be used to bring the facility into compliance with

federal and state public safety and environmental laws.[4] *Id.* (J.A. 7). In the alternative, New York requested that any funds it expended to clean up the site constitute a first lien, taking priority over any other mortgages or liens on the property. *Id.*

On June 22, 1982, United States Bankruptcy Judge D. Joseph DeVito ruled that the trustee could abandon the Long Island City facility, stating:

> The City and State of New York are the proper parties to safeguard the health and safety of their citizens. The duty of the Trustee is to serve as representative of the estate, and the duty of this Court is to protect the assets of the estate in custodia legis.
>
> The City and State are in a better position in every respect than either the Trustee or debtor's creditors to do what needs to be done to protect the public against the dangers posed by the PCB-contaminated facility. But it is not the estate or debtor's creditors who should finance the requisite clean-up, given the decision of the Trustee to abandon the property.

Oral Decision (App. K, 73a). Judge DeVito also denied New York's motion to designate governmental funds spent on such a cleanup as constituting a first lien on the property.[5] *Id.* (App. K, 74a).

Notices of Appeal to the District Court of New Jersey were filed on July 16, 1982. Although Judge Lacey affirmed the order

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[4] The trustee's allegation that there were no funds in the estate either to continue the security service at the Long Island City facility or otherwise to bring the site into compliance with government regulations, Brief for Petitioner Thomas J. O'Neill, Trustee ("T. Br.") at 5, is misleading. The estate in fact had significant assets which could have been converted into cash. For example, a portion of the waste oil inventory not contaminated with PCB's was sold, generating approximately $288,000.00. Brief of Petitioner, Midlantic National Bank ("Midlantic Br.") at 7.

[5] At the time of the petition to abandon, the Equitable Life Assurance Corporation and Portland Holding Corporation held mortgages on the property. Subsequently, both Equitable Life and Portland relinquished their mortgage interests. *Quanta*, 739 F.2d at 914 n.3 (App. A, 5a n.3). This issue of lien priority is therefore not before this Court.

of the bankruptcy court, he found that "the question is a close one." Memorandum Opinion, January 24, 1983, at 5 (App. G, 56a).[6]

New York filed a notice of appeal on February 17, 1983, and oral argument took place on October 24, 1983. On July 20, 1984, the court of appeals reversed the decisions of the bankruptcy and district courts. *Quanta*, 739 F.2d 912 (App. A, 1a). The court of appeals reasoned:

> If trustees in bankruptcy are to be permitted to dispose of hazardous wastes under the cloak of the abandonment power, compliance with environmental protection laws will be transformed into governmental cleanup by default. It cannot be said that the bankruptcy laws were intended to work such a radical change in the nature of local public health and safety regulation — the substitution of government action for citizen compliance — without indication that Congress so intended.

Id. at 921-22 (App. A, 22a). The court of appeals, however, made no specific ruling as to what assets of the estate should be used for compliance purposes. That issue "can properly be resolved only by the bankruptcy court, since the issue was not treated in the proceedings below and so the record on appeal does not include findings of relevant fact." *Id.* at 923 (App. A, 25a).

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[6] Because the Long Island City facility constituted such a grave threat to the safety and health of the residents of New York City, after the bankruptcy court authorized abandonment, a cleanup of the tanks and their contents was undertaken at public expense. That cleanup has now been completed. It did not, however, include removal of subsoil contamination. *Quanta*, 739 F.2d at 914 (App. A, 6a).

SUMMARY OF ARGUMENT

Section 554(a) of the Bankruptcy Code does not authorize a bankruptcy trustee to abandon a toxic waste facility where to do so imminently and substantially endangers the environment and public health and safety in violation of federal, state and local laws.

The court below held that the Bankruptcy Code did not preempt state and local public health and safety laws, without addressing whether the proposed abandonment also contravened federal laws. This Court, however, can avoid reaching this constitutional question of preemption by harmonizing two *federal* policies expressed in recent statutes: to protect the health and safety of the American public from toxic wastes, and to provide a fair distribution of debtors' assets among creditors.

Various provisions of the Bankruptcy Code demonstrate that Congress intended bankruptcy trustees as a general matter to comply with federal, state and local public safety laws. Section 554(a) codifies pre-Code law which authorized abandonment only when it does not endanger public safety. This section must also be read together with other provisions of the Code and federal statutes governing trustees. Section 959(b) of the Judicial Code requires a trustee in any cause to comply with valid state laws. Section 362(b)(4) of the Bankruptcy Code exempts post-petition state regulatory enforcement of public safety laws from the automatic stay of all legal proceedings against the debtor even when the grounds for enforcement are rooted in pre-petition conduct. In addition, under section 503(c) of the Bankruptcy Code, expenditure of funds to protect the public from the dangers posed by the toxic waste site is a necessary administrative cost of preserving the estate.

Nothing in the text, legislative history or policy expressed in several statutes passed by Congress in the last decade to protect our environment against hazardous waste products suggests any intention to allow a trustee in bankruptcy to ignore strict regulatory requirements by abandoning a burdensome property. Consequently, state and local laws paralleling these federal

enactments cannot be said to frustrate Congress' objectives in the Bankruptcy Code. Section 554(a) therefore does not preempt otherwise applicable state and local laws for the protection of public health and safety and the environment.

This Court has consistently rejected challenges to legitimate government regulations under the takings clause of the fifth amendment even when the practical effect of compliance would result in complete destruction of the value of the property. The court below properly concluded that limiting the trustee's power to abandon a toxic waste site that was in violation of public safety laws of general applicability, which were in effect at the time the loans were made, did not constitute a taking. The creditors did not have a reasonable, investment-backed expectation that those who operated this toxic waste storage facility would not be required to devote some of their resources to complying with environmental laws.

ARGUMENT

I. A BANKRUPTCY TRUSTEE MAY NOT ENDANGER THE HEALTH AND SAFETY OF MILLIONS OF CITY RESIDENTS BY ABANDONING A STORAGE FACILITY LEAKING TOXIC WASTES, IN VIOLATION OF FEDERAL, STATE AND LOCAL ENVIRONMENTAL STANDARDS.

Federal and state law clearly prohibit what the trustee in bankruptcy here proposed to do: walk away from a dangerous toxic waste facility in the midst of a major metropolitan area, placing large numbers of people in imminent peril of the consequences of leaking PCB's and possible fires. *See* Point I(A), I(B)(iii), *post*. The trustee, however, contends that he is empowered by Congress to endanger the public in this way, even if others are not, because the polluters responsible for the dangerous condition have taken refuge in bankruptcy.

Chiefly, the trustee relies on section 554(a) of the Bankruptcy Code, 11 U.S.C. 554(a) (1982), which provides that:

> [a]fter notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate.

The trustee argues that under this provision the bankruptcy court's inquiry is expressly restricted to whether the property is of inconsequential value or is burdensome to the estate. If the answer is yes, the court must approve abandonment. (T. Br. 13-16). According to the trustee's reading of section 554(a), any violation of a federal, state or local law designed to protect the public safety and the environment, as well as any danger to the public which would occur as a result of abandonment, is of no legal concern to the bankruptcy court.

The United States Court of Appeals for the Third Circuit flatly rejected this argument, finding no support for such a drastic construction of the abandonment provision. Instead, the court of appeals remanded the matter to the bankruptcy court with directions to fashion a solution consistent with the public interest and the requirements of federal and state laws concerning public safety and environmental protection. The State of New York and the City of New York submit that this decision is the only resolution of the matter that is fully consistent with and supported by the various federal and state public safety and environmental laws, the Bankruptcy Code, principles of statutory construction and prior judicial decisions.

A. Federal Environmental and Bankruptcy Laws Should Be Read in Harmony to Protect the Public Safety and the Environment.

In interpreting the limits on the trustee's abandonment power, the court below correctly found that the Bankruptcy Code, taken as a whole, does not preempt state and local laws concerning hazardous waste and designed to protect public health and safety, as we argue more fully below (Point I[B]). This Court, however, need not reach the constitutional preemption question because, we argue below, the abandonment of a facility containing hundreds of thousands of gallons of hazardous wastes violates a broad

range of *federal* environmental protection statutes, as well as parallel state and local laws.[7]

The need to accommodate the directives of different federal laws, of course, does not present supremacy clause questions. Rather, it presents a question of harmonization. The basic rule of statutory construction is that:

> [W]here two statutes are " 'capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.' " *Regional Rail Reorganization Act Cases*, 419 U.S., at 133-134, 95 S.Ct. at 353-354, quoting *Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474, 2483, 41 L.Ed.2d 290 (1974).

Ruckelshaus v. Monsanto, 104 S. Ct. 2862, 2881 (1984).

Here, no evidence has been produced of any congressional intent that the abandonment power of a trustee in bankruptcy under section 554(a) overrides the requirement of compliance with federal environmental laws, particularly those comprehensive laws that were passed or substantially amended since the Bankruptcy Code was enacted in 1978. Moreover, the purposes of the Bankruptcy Code and the purposes of the federal environmental protection laws are not mutually exclusive or antagonistic. As is discussed more fully below, Congress intended these two purposes to be harmonized.

Broadly viewed, the historic purpose of the federal bankruptcy statues is to bring about an equitable distribution of the bankrupt's estate among creditors "holding just demands based upon adequate consideration." *Kothe v. R.C. Taylor Trust*, 280 U.S. 224, 227 (1930). Environmental regulation is a more recent concern of the federal government. Reflecting a growing anxiety about the grave threat hazardous chemicals pose to the public

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[7] The State of New York argued in the courts below that the trustee's actions violated federal as well as state and local laws. *See, e.g.*, Brief of Appellants in the Court of Appeals for the Third Circuit at 5, 7-10, 12, 14, 23. The court of appeals did not directly address this point.

health and the environment, Congress in the past ten years has enacted several new statutes and amended existing statutes in order better to control this toxic threat.[8]

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[8] During the past decade, Congress has enacted or amended the following environmental protection laws:

a. Toxic Substances Control Act (TSCA), 15 U.S.C. § 2601 *et seq.* (enacted 1976, most recently amended 1984). In enacting TSCA, Congress declared that it was "the policy of the United States that . . . adequate authority should exist to regulate chemical substances and mixtures which present an unreasonable risk of injury to health or the environment, and to take action with respect to chemical substances and mixtures which are imminent hazards. . . ." 15 U.S.C. § 2601(b) (1982). As the Senate Report makes clear, Congress intended TSCA to be "a comprehensive measure to protect the public and the environment from exposure to hazardous chemicals." S.Rep. No. 698, 94th Cong., 2d Sess. 3, *reprinted in* 1976 U.S. Code Cong. & Ad. News 4491, 4493. The Senate Report demonstrates that Congress was particularly concerned about the dangers of PCB's, *id.* at 3-4, 1976 U.S. Code Cong. & Ad. News at 4493-94, and that Congress considered "controlling toxic chemicals in the environment is one of the crucial health requirements facing this nation." *Id.* at 4, 1976 U.S. Code Cong. & Ad. News at 4494.

b. Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.* (enacted 1980, most recently amended 1984). In passing this "Superfund" legislation known as CERCLA, Congress sought in part to address the problem of inactive hazardous waste sites which in the past "have forced state and local governments to bear the costs" of cleanup. H.R. Rep. No. 1016, Part I, 96th Cong., 2d Sess. 20, *reprinted in* 1980 U.S. Code Cong. & Ad. News 6119, 6123.

c. Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1251 *et seq.* (enacted 1948, most recently amended 1984). In passing the Clean Water Act, Congress announced a strong "national policy that discharge of toxic pollutants in toxic amounts be prohibited." 33 U.S.C. 1251(a)(3) (1982). The Senate Committee on Public Works conducted a two-year study of the existing federal water control program and concluded that "the national effort to abate and control water pollution has been inadequate in every vital aspect," S.Rep. No. 414, 92d Cong., 2d Sess. 7, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3668, 3674, and proposed a major change in the enforcement mechanism to increase the federal role. *Id.*, 1972 U.S. Code Cong. & Ad. News at 3675.

d. Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq.* (enacted 1976, most recently amended 1984).

e. Clean Air Act, 42 U.S.C. § 7401 *et seq.* (enacted 1955, most recently amended 1982).

The Long Island City toxic waste site is a facility governed by the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601(9)(1982). Under CERCLA, *any* person who disposes of hazardous waste at such a facility is liable for cleanup costs and damages. 42 U.S.C. § 9607(a) (1982). The debtor's estate and the trustee in his representative capacity are such "persons" under CERCLA. 42 U.S.C § 9601 (21)(1982). *See also In re T.P. Long Chemical, Inc.*, 45 Bankr. 278 (Bankr. N.D. Ohio 1985). The trustee cannot shift the liability of the estate to a third party. 42 U.S.C. § 9607(e)(1) (1982).

Abandonment of PCB-contaminated waste oil would also violate the Toxic Substances Control Act (TSCA) and regulations which explicitly prescribe the proper disposal of PCB's.[9] Pursuant to regulations, PCB-contaminated materials, depending on their concentration levels, must either be disposed of in special landfills or destroyed in approved incinerators. 40 C.F.R. § 761.60 *et seq.* (1984). The Environmental Protection Administration ("EPA") promulgated these comprehensive regulations after determining that "the manufacture, processing, and distribution in commerce of PCB's . . . presents an unreasonable risk of injury to health within the United States . . . based upon the well-documented human health and environmental hazard of PCB exposure." 40 C.F.R. § 761.20 (1984). Abandoning such highly toxic substances in the heart of New York City is clearly prohibited under TSCA.

In addition, abandonment of the Long Island City facility violated the imminent hazard provisions of the Resource Conservation and Recovery Act (RCRA) in effect at the time of the bankruptcy court's order, 42 U.S.C. § 6973 (1982), as well as those added in the 1984 amendments to the Act. 42 U.S.C.A. § 6972 (West Supp. 1985). Finally, the trustee's actions implicated the Clean Water Act's prohibition against discharges of hazardous substances into navigable waters. 33 U.S.C. § 1321(b)(3) (1982).

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[9] Because of the particular dangers posed to the public health and the environment by PCB's, they are the only class of chemicals which Congress has specifically addressed in a statute, rather than leaving them for regulation by EPA under its general authority to regulate toxic substances. *See* 15 U.S.C. §2605(e)(1982).

Under the Clean Water Act, the trustee cannot shift liability to a third party not responsible for the discharge. 33 U.S.C. § 1321(f),(g) (1982).

None of these comprehensive federal enactments expressly exempts from its requirements a trustee in bankruptcy seeking to abandon burdensome property. Legislative history fails to disclose any such congressional intention. Logic, too, suggests that the poisoning of our environment would not be considered benign or acceptable to Congress because it was done in order to preserve the assets of creditors. Congress was surely aware that requiring facilities which stored deadly substances to be maintained and monitored might diminish or even eliminate the creditor's security. It nonetheless gave higher priority to avoiding the costs and permanent consequences to the environment and public health and safety which would result from the dumping of indefinitely life-endangering substances.

Congress has not held the view, shared by the bankruptcy court below and the trustee, that cities and states should bear the financial responsibility for disposal and cleanup of hazardous chemicals generated by private parties. At the time of CERCLA's passage, Congress was aware that "EPA estimated that as many as 30,000 to 50,000 inactive and uncontrolled hazardous waste sites existed in the United States, and estimated that cleanup of the 1200 to 2000 most dangerous sites alone would cost between $13.1 and $22 billion. H.R. Rep. No. 1016, 96th Cong., 2d Sess. 18, 20 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 6120, 6123." *State of New York v. General Electric*, 592 F. Supp. 291, 302 n.21 (N.D.N.Y. 1984). Because Congress believed existing hazardous waste sites should not be cleaned up by public funds alone, it decreed that generators and transporters of hazardous chemicals, as well as owners and operators of property in which hazardous chemicals were stored or disposed of, were liable for cleanup costs, irrespective of the "Superfund" created by CERCLA. *State of New York v. General Electric*, 592 F.Supp. at 302; *United States v. Reilly Tar & Chemical Corp.*, 546 F.Supp 1100, 1112 (D. Minn. 1982).

Similarly, in broadening the citizens suit provision in RCRA in the 1984 amendments to that Act, Congress expressly recognized

that the government cannot be expected to be responsible to clean up all hazardous waste sites. In the report accompanying the amendments, the House Energy and Commerce Committee stated:

> The Committee believes this expansion of the citizens suit provision will complement, rather than conflict with, the Administrator's efforts to eliminate threats as to the public health and the environment, *particularly where the Government is unable to take action because of inadequate resources.*

H.R. Rep. No. 198, Part I, 98th Cong., 2d Sess. 53 , *reprinted in* 1984 U.S. Code Cong. & Ad. News 5576, 5612 (emphasis supplied). Surely, therefore, Congress did not intend government to step in and finance remediation of additional hazardous waste sites created by newly bankrupt companies when responsible parties were on the scene.

New York has been vigorous in enforcing these federal statutes.[10] Indeed, the Court of Appeals for the Second Circuit has recently affirmed the State's authority to obtain injunctive relief under state law and "response costs" under CERCLA for cleaning up a hazardous waste storage facility. *State of New York v. Shore Realty Corp.*, No. 84-7925, slip op. at 3065 (2d Cir. Apr. 4, 1985). New York was here seeking to remedy similar violations of both federal and state law. *See* n.7, *ante*.

B. The Trustee's Power to Abandon Under Section 554(a) Is Limited by Requirements of Public Safety.

The trustee points to the seemingly unqualified language of section 554(a) as authorizing him to abandon the Quanta facility

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[10] New York has additional authority to enforce federal environmental laws under its *parens patriae* power. It has frequently done so because it has "a quasi-sovereign interest in the health and well-being – both physical and economic – of its residents in general." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Baez*, 102 S. Ct. 3260, 3269 (1982); *People by Abrams v. 11 Cornwell Company*, 695 F.2d 34, 38 (2d Cir. 1982). In addition, the environmental laws create benefits and alleviate hardships which the "state will obviously wish to have accrue to its residents." *Snapp*, 102 S. Ct. at 3269; *11 Cornwell*, 695 F.2d at 39. *See also Maryland v. Louisiana*, 451 U.S. 725 (1981); *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945).

without regard to the requirements of recently enacted environmental safeguards. Whenever the policies of the Bankruptcy Code come into possible conflict with other federal policies, this Court has made clear the judiciary's function is to harmonize them. *See, e.g., National Labor Relations Board v. Bildisco*, 104 S. Ct. 1188, 1197 (1984); *see also In re Nitec Paper Corp.*, 43 Bankr. 492, 499 (S.D.N.Y. 1984); *In re Kish*, 41 Bankr. 620, 626 n.6 (Bankr. E.D. Mich. 1984); *In re Kennise Diversified Corp.*, 34 Bankr. 237, 245 (Bankr. S.D.N.Y. 1983). A trustee's abandonment power has never been so broadly construed as to sanction overriding of laws enacted for public health and safety, as a review of the case law leading to enactment of 11 U.S.C. § 554(a) (1982) indicates.

The provisions of the Code, read together, demonstrate a congressional intent that trustees in bankruptcy are to comply with laws designed to protect public health, safety and the environment. For example, section 554(a) is properly seen as having codified the "public endangerment" exception judicially developed prior to its enactment. Furthermore, the trustee's authority to abandon is subject to his duty to manage and operate the property in accordance with state law. 28 U.S.C. § 959(b) (1982). Likewise, there is an exception in 11 U.S.C. § 362(b)(4) (1982) to the automatic stay of all proceedings against the bankrupt for governmental enforcement actions. All evidence a clear congressional intention that bankruptcy concerns be accomodated with other important societal interests.

i. The Trustee's Authority to Abandon Is Subject to Health and Safety Laws.

Cases decided prior to the 1978 enactment of section 554(a) plainly recognize that a trustee's ability to abandon property has historically been subject to the requirements of public health and safety. Absent some indication of a contrary intent — and the legislative history of section 554(a) is silent on this — the proper conclusion to be drawn is that section 554(a) codifies the rule established in such cases as *Ottenheimer v. Whitaker*, 198 F.2d 289 (4th Cir. 1952), and *In re Lewis Jones, Inc.*, 1 Bankr. Ct. Dec. 277 (Bankr. E.D.Pa. 1974), that a trustee may not abandon

property where doing so would endanger public health and safety.[11] L. King, 4 *Collier on Bankruptcy* ¶554.01 at 554-5 (15th ed. 1985) ("This section [554(a)] makes few substantive changes in prior law, but seeks to clarify certain ambiguities and to codify cases resulting from legislative silence on the matter."); *accord*, Editorial Commentary and Analysis, Bankr. Serv. L. Ed. § 23:111 (1979). The judge-made law which section 554 codifies demonstrates quite plainly that although a trustee's power to abandon burdensome or worthless property was recognized by the courts long before the codification at 11 U.S.C. § 554(a) in 1978, "the exercise of the power to abandon is subject to the application of general regulations of a police nature."[12] L. King, 4A *Collier on Bankruptcy* ¶70.42(2) at 502-04 (14th ed. 1978).

In *Ottenheimer v. Whitaker*, the trustee in bankruptcy petitioned the court for leave to abandon, as burdensome to the estate,

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[11] Because the legislative history is silent, it is appropriate to consult these decisions in the interpretation of the codification in section 554(a). N. Singer, 2A *Sutherland Statutory Construction* § 48.03 at 291 (4th ed. 1984). *See also National Labor Relations Board v. Amax Coal Co.*, 453 U.S. 322, 329 (1980).

[12] The trustee argues that because Congress did not write into the section 554(a) abandonment power a "public endangerment" rule, it therefore intended to reject the judge-made rule, citing *National Labor Relations Board v. Bildisco*, 104 S. Ct. 1188 (1984) (T. Br. 15-16). The short answer is that there was no need to reiterate such a rule because, as we demonstrate below, 28 U.S.C. § 959(b) and 11 U.S.C. § 362(b)(4) limit the trustee's authority to abandon under section 554(a) and, in combination, mandate a "public endangerment" rule. Nonetheless, the Court's statement in that case that "Congress knew how to draft an exclusion . . . when it wanted to," 104 S. Ct. at 1195, here undermines the trustee's position. When Congress directed bankruptcy trustees in section 959(b) to manage and operate the property in accordance with state law, it provided an exemption for railroad reorganizations but none that would apply to the present case. When Congress decided not to stay automatically governmental enforcement proceedings once a petition is filed, it did not specify an exception for proposed abandonment by a trustee. 11 U.S.C. § 362(b)(4). When Congress wrote the numerous environmental laws discussed above, it could have excepted trustees in bankruptcy, either in general or only when they propose to abandon property, but did not do so, even though it did enumerate other exceptions to the coverage of those laws. *See, e.g.*, 42 U.S.C. § 9607(b) (1982) (defenses to CERCLA).

certain floating barges. The abandonment was opposed by the Harbor Engineer of Baltimore and the United States Army Corps of Engineers on the ground that the proposed abandonment would violate 33 U.S.C. § 409 (1982) (Act of Mar. 3, 1899), which made it unlawful to sink vessels in navigable channels. Testimony had shown that the barges were in dilapidated condition and, if abandoned, would sink at anchorage. The court not only denied the trustee permission to abandon the barges but directed him to remove them from the anchorage and mandated that the cost of removal be borne by the bankrupt estate as a cost of administration. The court of appeals declared that the well-settled rule that a trustee can refuse to accept property of an onerous or unprofitable nature would have applied were it not for the unusual consequences that would follow:

> There can be no doubt that the property not only has no value, but also that the care and disposition of it will involve the expenditure of a substantial sum of money. But it is equally true that if the trustee abandons the barges *and at the same time holds on to the valuable assets of the estate, the title to the barges will revert to the bankrupt and he will be left without means to care for or dispose of them in the manner prescribed by the statute.*

198 F.2d at 290 (emphasis added).

The Bankruptcy Court for the Eastern District of Pennsylvania reached a similar result in *In re Lewis Jones, Inc.*, 1 Bankr. Ct. Dec. 277 (Bankr. E.D. Pa. 1974). In that case, the trustees of three bankrupt utility companies sought instructions from the court concerning certain underground manholes, vents and steam pipes which could become hazardous to public health and safety if abandoned in their existing condition. These structures could be made safe by repaving, filling and sealing but only at a very substantial cost. In *Lewis Jones*, unlike in *Ottenheimer* or the present case, no federal or state statute would have been violated had the trustee not spent the money to remove the potential hazard. Nevertheless, despite the cost involved for the estate, the court ordered the trustees to remedy the potentially hazardous

condition, finding that "even absent the violation of a state or federal act, the public interest must be protected by the Bankruptcy Court." *Lewis Jones*, 1 Bankr. Ct. Dec. at 280. The *Lewis Jones* court relied, as did the court below, upon the principle announced in *Securities and Exchange Commission v. United States Realty & Improvement Co.*, 310 U.S. 434, 455 (1940):

> A bankruptcy court is a court of equity and is guided by equitable doctrines and principles except as they are inconsistent with the Act. A court of equity may in its discretion in the exercise of the jurisdiction committed to it grant or deny relief upon performance of a condition which will safeguard the public interest. (citations omitted).

There is no indication that in codifying the abandonment power, Congress intended to eliminate the judicially evolved "public endangerment" exception. Indeed, it was recently reaffirmed in *In re T.P. Long Chemical Co.*, 45 Bankr. 278 (Bankr. N.D. Ohio 1985). Adopting the same reasoning as the court below, the bankruptcy court held that section 554(a) did not authorize a trustee to abandon barrels of hazardous materials. The court stated that "the congressional policy underlying CERCLA is that those who generate, use, or transport hazardous materials should be required to pay the cost of damages caused by the hazardous materials" and that "the estate cannot avoid the liability imposed by CERCLA." 45 Bankr. at 286. Similarly, in *In re 30 Hill Top Street Corp.*, 42 Bankr. 517, 519-520 (Bankr. D. Mass. 1984), the court denied the trustee's motion to abandon a nursing home in a Chapter 7 case where the proposed abandonment would return the property to the debtor, who was in no position to correct the deficiencies in health care services which threatened the health and safety of the patients.

ii. Requiring the Trustee to Manage the Estate in Compliance with Federal and State Environmental Laws Is Consistent with *Ohio v. Kovacs*.

In *Ohio v. Kovacs*, 105 S.Ct. 705 (1985), this Court held that the obligation of an individual debtor to comply with a state

court injunction, which was issued prior to the filing of a bankruptcy petition and required him to clean up a toxic waste dump, had been converted into an obligation to pay money dischargeable in bankruptcy when the individual debtor had been relieved of his property by a receiver *prior* to the bankruptcy. Kovacs was therefore unable to satisfy the obligation to clean up the site other than by a payment of money, even before the bankruptcy petition was filed. 105 S. Ct. at 710-711. Here, by contrast, the state is seeking to enforce the post-petition obligation of the trustee in charge of the site not to take steps which violate federal and state environmental laws designed to protect the public. (The trustee concedes that "[t]he states are free to direct future conduct of debtors and debtors-in-possession. . . ." (T. Br. 35).).

This Court, in reaching the decision in *Kovacs*, was careful to limit its holding to the narrow issue presented. It declared that it did not question that anyone in possession of the site, including a trustee in bankruptcy, must comply with the state's environmental laws. 105 S. Ct. at 711-12. Likewise, the Court further stated in *Kovacs* that it was *not* holding that "the injunction against bringing further toxic wastes on the premises or *against any conduct that will contribute to the pollution* of the site or the State's waters is dischargeable in bankruptcy," 105 S.Ct. at 711 (emphasis supplied), and, citing *Penn Terra, Ltd. v. Department of Environmental Resources*, 733 F.2d 267 (3d Cir. 1984), noted that the automatic stay provision of section 362(a) "does not apply to suits to enforce the regulatory statutes of the State." *Kovacs*, 105 S.Ct. at 711 n.11.[13] Thus, *Kovacs* did not relieve the trustee,

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[13] This conclusion is consistent with other lower court decisions refusing to stay regulatory injunctions and license revocations regulating future conduct of the debtor, even when the grounds for such enforcement arose before bankruptcy. *See, e.g., In re Thomassen*, 15 Bankr. 907 (Bankr. 9th Cir. 1981) (permitting administrative proceedings which could have resulted in revocation of debtor physician's license on the basis of pre-bankruptcy professional negligence); *Commodities Futures Trading Commission v. Incomco, Inc.*, 649 F.2d 128 (2d Cir. 1981) (permitting regulatory enforcement proceeding seeking to enjoin activities in the commodities market on the basis of pre-bankruptcy violations); *In re D.H.*

(Footnote Continued)

as the person in possession of the hazardous waste dump for nearly eight months, of an obligation to manage the site without risking harm to the public and not to endanger the public further by abandoning it in violation of federal or state law.[14]

iii. Section 959(b) Requires the Trustee to Comply with Public Health and Safety Requirements When Managing and Abandoning Property.

Section 959(b) of the Judicial Code requires the trustee to "manage and operate the property" according to state law. The trustee argues that because of section 554(a) he could jettison any obligation to obey state laws by abandoning the property. New York contends, to the contrary, that in view of the history of judicially established limitations on the trustee's power to abandon, section 554(a)'s conferral of that power is to be read *in pari materia* with the basic obligation of the trustee under federal law to manage and operate the property consistently with state law requirements. 28 U.S.C. § 959(b).[15]

(Footnote Continued)
Overmeyer Telecasting Co., Inc., 35 Bankr. 400 (N.D. Ohio 1983) (permitting FCC proceedings to suspend debtor's broadcasting license); *In re Kennise Diversified Corp.*, 34 Bankr. 237, 243 (Bankr. S.D.N.Y. 1983) (permitting housing authority to correct serious housing code violations endangering tenants although debtor landlord's conduct was rooted in pre-petition period).

[14] This Court never addressed in *Kovacs* whether the trustee could simply abandon a currently dangerous toxic dump to an insolvent debtor without making provisions to protect the public. In *dicta*, this Court merely noted that section 554(a) authorizes abandonment of valueless property, but it did not have occasion to determine the scope of the public endangerment exception codified in that section. 105 S.Ct. at 711 n.12. There was no finding in *Kovacs* that the toxic dump at the time of bankruptcy posed the imminent danger presented here.

[15] *In re Kennise Diversified Corp.*, 34 Bankr. 237, 243 (Bankr. S.D.N.Y. 1983), provides support for this analysis. In that case, the court declared that "Bankruptcy Code § 362(b)(4) and 28 U.S.C. § 959 form a smooth continuum and make it apparent that Kennise as debtor in possession must operate its building according to the dictates of non-bankruptcy law that would apply if there were no Chapter 11 case." *See also In re Briarcliff*, 15 Bankr. 864, 868 (D.N.J. 1981) (holding that the exemption from the automatic stay provision in section 362(b)(4) must be read together with section 959).

There is no question that the abandonment of half a million gallons of flammable liquids, much of it contaminated with dangerous PCB's, in the middle of New York City violates New York law. In fact, it is a felony. N.Y. Envtl. Conserv. Law ("ECL") 71-2713 (McKinney 1984). *See also* ECL §§27-0701, 0914; 71-2711, 2712 (McKinney 1984); *State of New York v. Shore Realty Corp.*, slip op. at 3099 (public nuisance). In effect, the trustee acknowledges that by virtue of section 959(b) he would be bound by New York's environmental laws if Quanta were in reorganization (T. Br. 23), but he maintains that section 959(b) applies only in a reorganization, not in a liquidation.[16] There is no support for this narrow reading in the text of section 959(b), its legislative history, judicial interpretation or logic.

First, on its face section 959(b) applies to a trustee "appointed in *any* cause pending in *any* court of the United States." 28 U.S.C. §959(b)(1982)(emphasis supplied). The *only* exception is "as provided in section 1166," *id.*, which governs railroad reorganization proceedings and is inapplicable here; under well-settled principles of statutory construction, "[t]he enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded." N. Singer, 2A *Sutherland Statutory Construction* §47.23 at 194 (4th ed. 1984). No distinction is made in the language of the statute between managing a reorganization and managing an orderly liquidation. In fact, Congress clearly envisioned the trustee managing and operating a business under Chapter 7 because 11 U.S.C. § 721 (1982) authorizes such activity by the trustee.

There is, likewise, nothing in the legislative history indicating that section 959(b) applies only in a reorganization. Courts other than the court below have held section 959(b) applicable to trustees managing property in liquidations. For example, in *In re 30 Hill Top Street Corp.* the court held that a trustee operating

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[16] The court of appeals determined that even if section 959(b) does not by itself require compliance with state and local law governing hazardous waste facilities, as New York believes it does, section 959(b) assuredly does provide more evidence that Congress did not intend the Bankruptcy Code to preempt state and local police power governing safety and health. 739 F.2d at 919 (App. A, 17a).

a nursing home in a Chapter 7 case pursuant to the trustee's section 721 power to operate a business during liquidation was obligated under section 959 to comply with state law. Similarly, the court in *In re Charles George Land Reclamation Trust*, 30 Bankr. 918 (Bankr. D. Mass. 1983), held that a trustee in a Chapter 7 liquidation case must manage a hazardous waste site in compliance with state law and protect the public from leaking toxic wastes. *See also In re Briarcliff*, 15 Bankr. 864, 868 (D.N.J. 1981) (*dictum* that trustees in any case are obligated under section 959 as officers of the court "to comply with applicable State and local law while they carry on their activities").

Likewise, there is not the slightest support in policy or logic for the anomalous interpretation advanced by the trustee. Adoption of the trustee's reasoning would lead to the peculiar result that a trustee is required to comply with state environmental laws while administering the estate under a Chapter 11 reorganization case, but is free from such restrictions if the estate is converted to a Chapter 7 case. This would provide an obvious incentive for unscrupulous debtors and creditors to seek to convert reorganization cases to Chapter 7 cases. Encouraging such hazardous enterprises to go into liquidation in order to avoid compliance with environmental laws is precisely the opposite of what Congress intended.

Moreover, the logic of the cases discussed below, applying section 959(b) to require trustees in reorganization cases to comply with state laws regardless of financial consequences, is equally compelling in a Chapter 7 liquidation case where no hope remains of salvaging a business. In each of these cases, where the actions of the debtor in possession, trustee or receiver would or could have caused injury to the public or the environment, the court held that the police and regulatory powers of the state took precedence, even where such regulations might affect the rehabilitation of the debtor and result in significant reduction of its assets.

In *Gillis v. California*, 293 U.S. 62 (1934), this Court rejected the receiver's request to be relieved of compliance with a California licensing law, even though without such relief the

reorganization would fail. In *In re Dolly Madison Industries*, 504 F.2d 49[illegible] (3d Cir. 1974), the court upheld the revocation of a certificate to do business by the State of Virginia for failure of a business in reorganization to pay a registration fee and file annual reports. In *In re Nitec Paper Corp.*, 43 Bankr. 492 (S.D.N.Y. 1984), the court held that under section 959, "[a] reorganization must be formulated within the bounds of existing state and federal law." *Id.* at 499 (footnote omitted). The courts in *In re Briarcliff* and *In re Kennise Diversified Corp.* reached similar results. The court in *In re Canarico Quarries, Inc.*, 466 F.Supp. 1333 (D.P.R. 1979), required a corporation in Chapter XI to comply with the requirements of the Puerto Rican Environmental Quality Board, by ceasing emissions in violation of the Federal Clean Air Act, even if such compliance required the closing of the business, thereby defeating the purposes of the attempted arrangement. *See also Colonial Tavern, Inc. v. Byrne*, 420 F.Supp. 44 (D. Mass. 1976) (suspension of liquor license upheld for repeated violations of midnight closing hour regulations); *In re Grand Spaulding Dodge, Inc.*, 5 Bankr. 481 (N.D. Ill. 1981) (suspension of automobile dealership license due to fraud upheld, citing in part 28 U.S.C. § 959(b)); *Commonwealth v. Peggs Run Coal Co.*, 55 Pa. Commw. 312, 423 A.2d 765 (1980) (permitting the state to close a coal production facility which was violating local environmental laws).[17]

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[17] This analysis of section 959(b) is consistent with the interpretation given by some courts to the narrower limitation in section 959(a) providing that trustees "may be sued . . . with respect to any of their acts or transactions in carrying on business connected with such property." 28 U.S.C. §959(a)(1982). These courts have permitted suits against trustees under section 959(a) for tortious acts committed by trustees during liquidation or reorganization which have harmed members of the public, while carefully distinguishing such suits, which do not affect the title, possession, control, liquidation or distribution of the assets, from those which directly interfere with administration of the estate. *See, e.g., In re 30 Hill Top Street Corp.* (trustee in Chapter 7 liquidation operating nursing home obligated under section 959(a) to comply with state public safety laws); *McGreavey v. Straw*, 90 N.H. 130, 138, 5 A.2d 270, 276 (1939).

The *sole* authority cited by the trustee before this Court (T. Br. 22-23)[18] in support of his contention that section 959(b) does not govern the activities of trustees in liquidation cases is a statement in J. Moore, 7-Pt. 2 *Moore's Federal Practice*, ¶66.04(4) at 1913 (2d ed. 1984), concerning whether state laws regulating distribution of funds in receivership must be followed:

> §959(b) applies only to the receiver in the operation of property in his possession. It does not apply to the distribution of the estate, and does not require the federal receivership court to comply with state laws regulating distribution of funds in receivership, although *Erie R. Co v. Tompkins* should now require it to do so in cases involving only non-federal matters. (footnotes omitted).

Clearly, the treatise does not address whether state health and safety or other police regulations must be followed in a liquidation case. Rather, it is discussing whether state or federal laws would govern when the only question concerns the *distribution of assets*. As the last clause of the quoted language indicates, Prof. Moore's treatise is not authority for the proposition that the trustee need not comply with state environmental laws in a liquidation case.

Given that section 959(b) "is a clear indication that in general the congressional scheme was not intended to subjugate state and local regulatory laws," *Quanta*, 739 F.2d at 919 (App. A, 17a), there is simply no justification to limit artificially the broad term

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[18] The trustee has properly abandoned his reliance on *dicta* in a footnote in *State of Missouri v. United States Bankruptcy Court*, 647 F.2d 768, 778 n.18 (8th Cir. 1981), *cert. denied*, 454 U.S. 1162 (1982). In that case, the court indicated a "doubt" that the trustee would have to obtain a state license to sell grain if the company were liquidating rather than reorganizing. The court cites no authority for this proposition. Moreover, as the court below indicated, *Quanta*, 739 F.2d at 920 (App. A, 18a), had the trustee proposed to enhance the estate by selling contaminated grain in violation of state law, regardless of threats to health and safety, it is unlikely the Eighth Circuit would have entertained doubts.

"management"[19] in section 959(b) to exclude the trustee's proposed abandonment of burdensome property. Abandonment of burdensome property is plainly an act undertaken by the trustee to "manage and operate the property" of the estate.[20] Under section 959(b), it must therefore be done in conformity with state law. This obvious reading permits the trustee's authority to abandon property under 11 U.S.C. § 554(a) to be readily harmonized with the strictures of both federal and state environmental laws. It also makes evident sense. There is no reason to believe that Congress wished to allow terminally ill businesses, unlike those on the critical list, to expire in derogation of state law. Finally, this construction of section 959(b) is compelling because it obviates the need for a constitutional determination as to whether section 554(a) preempts state and local environmental laws.

iv. To Deprive State and Local Governments of the Ability to Prevent Threatened Disposals of Dangerous Hazardous Waste Is Inconsistent with Congressional Intent.

State and local governments must always have, under their police powers, the ability to forestall imminent peril to their general populace by doing what New York here sought to do: obtain a remedial court order addressed to a demonstrable threat in the near term to public health, safety and the environment. To hold otherwise is, we fear, to imperil the public, despite the plain intent of Congress to lessen the perils posed by toxic waste facilities. It also is to extend an open invitation to the unscrupulous to use the bankruptcy courts to avoid the stringent requirements of recently enacted environmental laws.

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[19] Webster's Third New International Dictionary (1976) defines management as "the act or art of managing . . . the conducting or supervising of something . . . directing, controlling, and supervising any industrial or business project or activity with responsibility for results . . . judicious use of means to accomplish an end . . . skillful . . . treatment . . . ."

[20] Although the court of appeals indicated it believed this construction of section 959(b) "would seem open to question," it stated further that "[i]t would not strain the language to construe 'management of the property' to include abandonment of a facility." *Quanta*, 739 F.2d at 919 (App. A, 17a).

This obvious concern must have been what prompted this Court in *Ohio v. Kovacs* to caution what it was *not* declaring: that the filing of a petition in bankruptcy excuses a pre-existing duty not to dispose of toxic wastes improperly, or relieves the trustee of the need to comply with environmental laws. 105 S.Ct. at 711. In the present proceeding, this Court ought not render local authorities impotent to protect health and safety against a palpably awesome menace, such as was posed by the Quanta site, absent the clearest indication that Congress intended such an extensive evisceration of traditional local regulatory authority. Plainly, no such indication has been provided.

Rather, as the court of appeals found, 739 F.2d at 918 (App. A, 15a), the contrary intent appears from Congress' enactment of an exception to the automatic stay provision of the Bankruptcy Code for "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." 11 U.S.C. § 362(b)(4); *see also* 28 U.S.C.A. § 1452 (West Supp. 1985) (limiting removal of actions by governmental units to enforce police or regulatory authority). The Senate's Report on this provision expressly contemplated its application to suits concerning environmental protection laws. S. Rep. No. 989, 95th Cong., 2d Sess. 52, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5838. This exception to the general rule staying legal proceedings against the debtor is persuasive evidence that Congress did not envision state and local governments being powerless to use their "police or regulatory power" to protect public safety, health and the environment when those are threatened by such proposed actions of a trustee as abandonment of a toxic waste facility.

The trustee argues, however, that in abandoning Quanta's storage facility containing hazardous, flammable liquids he has taken no affirmative act, but has merely divested the estate of title to the property so that it is revested in the debtor corporation. (T. Br. 24). In short, he argues, abandonment is not really disposal. The trustee's argument is factually and legally incorrect.

First, as shown above, by removing guards and supervisory personnel, shutting down the fire suppression system and leaving

hazardous wastes leaking from an unattended facility, the trustee created a new, highly dangerous situation which cannot be attributed to the acts of the debtor. The trustee's analysis of the import of his activities in abandoning this property may apply to innocuous, static property posing no public risk; it is, however, woefully deficient where federal, state and local laws recognize that the proper maintenance and handling of such property is perpetually a matter of grave public concern. To abandon or fail to maintain a dangerous waste facility is to *create* a hazard to the community, for hazardous waste which is separated from the equipment, supervision and resources necessary to control its destructive potential is radically different from hazardous waste which is stored, supervised and disposed of properly.

If the property of the estate included not a toxic waste facility but rather a zoo full of sick animals which, because of their diseased condition, could not be sold, the trustee would surely not be empowered to sell the cages, fire the caretakers and abandon those dangerous animals, separating them from the personnel, equipment and other resources necessary to control them. By the same token, a trustee surely would not be permitted to strip a nuclear power plant of its salable items of equipment, dismiss the personnel and abandon the uncontrolled reactor, with the excuse that it was the debtor who had started the chain reaction many years earlier. It is the very act of removing the assets necessary to control the hazardous waste that creates the danger to the community.

The trustee's argument is legally flawed as well. The United States Court of Appeals for the Fourth Circuit rejected such an active-passive distinction in interpreting disposal of hazardous wastes pursuant to RCRA, 42 U.S.C. § 6973 (1982). In *United States v. Waste Industries, Inc.*, 734 F.2d 159, 164 (4th Cir. 1984), the court stated:

> [A] strained reading of that term ["disposal"]limiting its section 7003 meaning to active conduct would so frustrate the remedial purpose of the Act as to make it meaningless. Section 7003, unlike the provisions of the Act's subtitle C, does not regulate conduct but

> regulates and mitigates endangerments. The Administrator's intervention authorized by section 7003 is triggered by evidence that the "disposal of ... hazardous waste *may present* an imminent and substantial endangerment." (emphasis supplied by court).

The trustee's argument that the only consequence of his action is that the hazardous waste reverts to the debtor sidesteps the critical fact that he has removed all assets from the debtor. The Third Circuit properly recognized that an act which separates hazardous waste from the assets necessary to check its destructive potential constituted final disposal of the hazardous waste which "clearly contravened applicable law, and did so not merely technically, but with severely deleterious implications for the public safety." *Quanta*, 739 F.2d at 921 (App. A, 21a). To say, as the trustee does, that the debtor corporation is now responsible for the hazardous waste is to engage in dangerous fiction because the debtor has been reduced to a paper entity without assets.[21]

Finally, the trustee makes a fundamental error in characterizing New York as a creditor seeking to obtain a priority status not otherwise provided for in the Bankruptcy Code. In June of 1981, when the City and State of New York appeared in bankruptcy court to oppose the trustee's effort to abandon the Long Island City facility, they did so not as creditors, for in fact nothing was owed financially by the debtor to New York. Rather, the City and State appeared in order to inform the court that abandonment of hazardous wastes, the act for which the trustee sought court approval, would create a grave danger to the health and safety of the public and violate federal, state and local environmental laws. It was only as a result of the bankruptcy court's

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[21] Indeed, a further distinction between Kovacs and this case is that debts of individual debtors such as Kovacs are dischargeable in bankruptcy, 11 U.S.C. § 727 (1982), whereas those of a corporate debtor such as Quanta are not. *Id.* Congress eliminated dischargeability of corporations because it assumed that corporations would be empty shells and it wanted to "avoid trafficking in corporate shells." H.R.Rep. No. 595, 95th Cong., 1st Sess. 384, 1978 U.S. Code Cong. & Ad. News 5787, 6340.

erroneous determination to permit abandonment that New York was compelled to expend monies in an effort to safeguard the public. That initial determination is what the court below properly rejected.[22] New York's right to recover those monies is not at issue in this proceeding, as the court of appeals found. *Quanta*, 739 F.2d at 923 (App. A, 25a).

v. The Trustee's Expenditure of Funds to Prevent Violations of Federal and State Environmental Laws Is a Necessary Cost of Preserving the Estate.

To hold that the trustee cannot abandon the property in violation of federal and state environmental laws is concededly to require the trustee to continue to expend funds to assure compliance with those laws. That, the court of appeals noted, is what Congress intended generally, *i.e.*, to prevent government from assuming all the costs of toxic waste dumping. 739 F.2d at 922 n.10 (App. A, 22a n.10). The issue now before this Court, however, is not whether in a distribution of assets the secured creditors' claims can be subordinated to government's claims for expenditures for a complete cleanup. It is whether the trustee can be compelled to expend estate funds to maintain the property until government or the trustee or both have taken necessary steps to assure that the property can be disposed of in compliance with federal and state environmental, health and safety laws.

The specific authorization for this action by the trustee, we submit, is the provision of 11 U.S.C. § 503(b)(1)(A) (1982) allowing the trustee to pay the "actual, necessary costs of preserving

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[22] The issue of the trustee's obligation to clean up the site is not, as he contends (T. Br. 7), moot. First, as the court below found, the cleanup was only partial and the subsoil at the hazardous waste site remains contaminated. *Quanta*, 739 F.2d at 914 (App. A, 6a). Second, even if the cleanup had been completed, the trustee's approach would preclude appellate review of this question of critical public concern whenever the court declined to stay an order of abandonment pending appeal. Under long-settled principles, cases such as this which are "'capable of repetition, yet evading review,'" *Roe v. Wade*, 410 U.S. 113, 125 (1973) (quoting *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515 (1911)), are not moot.

the estate." It does no violence to the language of the Bankruptcy Code to find that maintaining guard service, retaining fire-fighting equipment and patching leaky tanks are necessary costs of preserving the estate until such time as the property can be abandoned or otherwise disposed of lawfully. *Ottenheimer v. Whitaker*, 198 F.2d at 290.

Surely, as a matter of economic preference, secured creditors would wish that the costs of compliance with environmental laws be borne not by their debtor but by the public generally, whether or not the debtor is in bankruptcy. Congress, however, has expressed a different intent. Insuring that private parties with commerical interests at stake do not literally dump their problems on the general public provides the rationale for treating costs of at least maintaining the *status quo* as necessary administrative expenses. *In re T.P. Long Chemical, Inc.*, 45 Bankr. at 286-87; *In re Vermont Real Estate Investment Trust*, 25 Bankr. 804 (Bankr. D. Vt. 1982); *see* L. King, 3 *Collier on Bankruptcy*, ¶503.04 at 503-515 (15th ed. 1983).[23]

Concededly, there may come a point at which requiring the trustee over a lengthy period to exhaust all available assets of the estate to prevent or remedy violations of the law can no longer be characterized as benefiting the dwindling estate. *See In re T.P. Long Chemical, Inc.*, 45 Bankr. at 287-90. That, however, is not the situation posed by New York to the bankruptcy court. Here, and in general, New York was concerned with a short-term necessity: preventing an abandonment that threatened public safety, by having the court direct that the trustee expend whatever funds were necessary to maintain the *status quo* until appropriate corrective measures could be undertaken. That, we have argued,

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[23] Although the bankruptcy court reached a different conclusion in *In re Charles George Land Reclamation Trust*, 30 Bankr. 918, 922 n.6 (Bankr. D. Mass. 1983), it ignored the contrary decisions in *Ottenheimer* and *Vermont Real Estate Investment Trust*. The only support cited for its unprecedented decision was the failure of Congress to take any action on a bill introduced before the decisions in *Vermont Real Estate Investment Trust* and *T. P. Long Chemical* which would expressly ratify the *Ottenheimer* interpretation of the Code. Legislative history such as this, however, is entitled to little weight. In any event, the proposed amendment became unnecessary in light of subsequent decisions.

is compelled by section 959(b) and case law delimiting the trustee's power to abandon dangerous property. Requiring the trustee to continue to undertake such administrative expenses was well within the general equitable powers of a bankruptcy court. *See, generally, Pepper v. Litton*, 308 U.S. 295 (1939); *see also Reading Co. v. Brown*, 391 U.S. 471 (1968) (Harlan, J.) (holding, in view of general purposes of administrative expense provision and the Bankruptcy Act as a whole, as well as principles of equity, that tort claims against a receiver under Chapter XI prior to bankruptcy were entitled to status of administrative expenses). At such time as the purposes of the Bankruptcy Code would no longer be served by indefinitely maintaining such a state of affairs, the bankruptcy court could, as an alternative to permitting abandonment, dismiss the Chapter 7 proceedings, as in the case of *In re Charles George Land Reclamation Trust* relied upon by the trustee (T. Br. 18-19),[24] so that a receiver might be appointed by the state courts. *See In re 30 Hill Top Street Corp.*, 42 Bankr. at 522.

C. The Trustee May Not Abandon Property in Violation of State and Local Health, Safety and Environmental Requirements.

We have argued above that this case does not present for decision the issue of whether the abandonment provisions of the Bankruptcy Code preempt state and local environmental laws. However, to the extent New York here was enforcing its own laws as well as parallel federal laws, application of New York's laws was not preempted by section 554(a).

Consideration of whether a state provision violates the supremacy clause "starts with the basic assumption that Congress does not intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

Here, there is no question of express preemption. Indeed, Congress, we have argued, expressly mandated in 28 U.S.C. § 959(b)

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[24] The court there noted that dismissal "would allow the EPA and the [state environmental agency] to assert their full panoply of powers under the Federal and State Superfund statutes." 30 Bankr. at 925.

that there be no preemption of state laws when it directed the trustee to manage and operate the estate consistently with such laws. By simply construing section 959(b) of the Judicial Code and section 362(b)(4) of the Bankruptcy Code as governing section 554(a) of the Bankruptcy Code, we have contended, the Court obviates the need to reach any preemption issue.

The only question remaining is whether requiring the trustee to take elementary steps to protect the public from harm, which are required by state and local laws governing hazardous wastes, would frustrate the purpose of the Bankruptcy Code. *See Maryland v. Louisiana*, 451 U.S. at 746-47 and cases there cited. In New York's view, it clearly would not.

In *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 633-36 (1981), this Court rejected an effort to suppress a state severance tax because it purportedly frustrated national energy policies established in the Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. § 8301(b)(3)(1982). Citing the preemption standards enunciated in *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963) ("[p]re-emption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained'"), this Court rejected the suggestion that "general statements demonstrate a congressional intent to preempt all state legislation that may have an adverse impact. . . ." 453 U.S. at 634, 633. By looking at the energy legislation as a whole, the *Commonwealth Edison* Court found clear indication that the statute contemplated the continued existence of state severance taxes.

Similarly, the Bankruptcy Reform Act of 1978, when viewed as a whole, indicates a clear congressional desire that the state's public health and safety regulations should continue to exist harmoniously with the requirements of the bankruptcy laws. It is difficult to imagine why Congress would direct a trustee to "manage and operate" the estate in compliance with state laws, 28 U.S.C. § 959(b), but yet intend, without so stating, to displace

those same laws under section 554(a) if abandonment were contemplated. Likewise, the court of appeals cited the decision not to stay government enforcement proceedings automatically upon the filing of a bankruptcy petition as additional evidence of Congress' intent not to displace state laws. *Quanta*, 739 F.2d at 918 (App. A, 15a). 11 U.S.C. 362(b)(4) authorizes New York to continue proceedings brought under its "police or regulatory power" notwithstanding the filing of a petition in bankruptcy.[25]

Moreover, by its enactment of TSCA, CERCLA and the Clean Water Act, Congress expressed in no uncertain terms a *national* policy requiring careful, proper disposal of hazardous wastes. Nowhere did it preempt state and local laws directed toward the same end. There is, therefore, every reason to conclude that Congress did not intend to suppress the vital public interest contained in these state and local laws controlling the disposal of hazardous waste when, in the Bankruptcy Reform Act, it provided for the orderly liquidation of a debtor's estate and its expeditious distribution to creditors. Certainly, had such an exception been intended, it could have been written into the Bankruptcy Code's provision on abandonment, section 554(a), or into section 959(b) of the Judicial Code.

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[25] In enacting the Bankruptcy Reform Act of 1978, Congress was concerned that bankruptcy courts not use their authority to disrupt the enforcement of statutes adopted pursuant to the states' police power to protect public health and safety and the environment. The House Report makes it clear that the interests of the state in protecting its citizens and its environment are to be carefully balanced against the competing interests of creditors by the Bankruptcy Court:

> Under present law, there has been overuse of the stay in the area of governmental regulation. For example, in one Texas bankruptcy court, the stay was applied to prevent the State of Maine from closing down one of the debtor's plants that was polluting a Maine river in violation of Maine's environmental protection laws. . . . The bill excepts these kinds of actions from the automatic stay. . . . The court will [now] be required to examine the State actions more carefully and with a view to protecting the legitimate interests of the State as well as of the estate. . . .

H.R. Rep. No. 595, 95th Cong., lst Sess. 174-75, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 6135 (footnote omitted).

In *Silkwood v. Kerr-McGee Corp.*, 104 S.Ct. 615 (1984), this Court, in support of its holding that federal law does not preempt state standards for damages due to radiation injuries, observed that there was no indication that Congress ever seriously considered precluding the use of state remedies. This silence was "particularly significant" since it "is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." 104 S.Ct. at 623. Similarly, given the silence that accompanied the enactment of section 554(a), it is difficult to believe that Congress intended, without comment, to work so drastic a change of previously developed judicial doctrine and recently enacted statutes as to permit a trustee to disregard public health, safety and environmental laws. Applying the reasoning of such cases as *Commonwealth Edison Co. v. Montana* and *Silkwood v. Kerr-McGee*, the court below properly refused to infer "such a radical change in the nature of local public health and safety regulations—the substitution of governmental action for citizen compliance without an indication that Congress so intended." *Quanta*, 739 F.2d at 921-22 (App. A, 22a).

The trustee contends nonetheless that the supremacy clause requires the suspension of the states' public health and hazardous waste laws as to him because operation of these state laws frustrates the purpose of the Bankruptcy Code. (T. Br. 17.) The preceding discussion, however, demonstrates that federal laws themselves seek to assure that valid governmental regulations are obeyed during the orderly liquidation of assets and their distribution to creditors. Congress, therefore, has determined that bankruptcy policy is not by its nature antagonistic to or irreconcilable with public health and safety laws, nor is there an "impossibility of dual compliance," *Florida Lime & Avocado Growers v. Paul*, 373 U.S. at 143. Certainly the courts have not viewed these statutory schemes as mutually exclusive. Cases such as *Ottenheimer v. Whitaker* and *Lewis Jones*, taken together with the directives of 28 U.S.C. § 959(b) and 11 U.S.C. § 362(b)(4), make clear that the trustee's power under the bankruptcy laws and the public health and safety concerns expressed in state law not only can be reconciled but, in Congress' view, must be reconciled.

Thus, it cannot be said that state and local environmental law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941), where Congress itself has required what New York also demands: the safe, proper disposal of hazardous substances.

II. LIMITING THE TRUSTEE'S POWER TO ABANDON PROPERTY IN VIOLATION OF FEDERAL AND STATE ENVIRONMENTAL LAWS IS NOT A "TAKING" UNDER THE FIFTH AMENDMENT.

The court below correctly determined, based on a long line of decisions by this Court, that state enforcement of environmental laws, even when it causes financial expenditure or economic loss, is not a "taking" under the fifth amendment. *Quanta*, 739 F.2d at 922 n.11 (App. A, 23a n.11). Nevertheless, the trustee claims that limiting his power to abandon pursuant to section 554(a) is inconsistent with this Court's decision in *United States v. Security Industrial Bank*, 459 U.S. 70 (1982), and violates the takings clause of the fifth amendment. (T. Br. 20-22).[26] As demonstrated below, these contentions lack merit for at least three reasons. First, the issue is not ripe. Second, as this Court has long recognized, a state's enforcement of its environmental laws is not a "taking" even if it results in total destruction of the value of the property. Third, neither *Security Industrial Bank* nor any of the limited exceptions to this long-settled rule is applicable here.

A. The Fifth Amendment Takings Issue Is Not Ripe for Adjudication by this Court.

The court below did not reach the question of what, if any, estate funds should now be devoted to reimbursing New York for the Quanta cleanup, but rather remanded that question to the bankruptcy court to make appropriate findings of fact. *Quanta*, 739 F.2d at 923 (App. A, 25a). The bankruptcy court has made no findings of fact as to what assets are available, to what extent claims are secured or unsecured, what types of secured claims exist, how the secured claims were created and what were the secured creditors' reasonable expectations. It is, therefore, premature for this Court to examine that question at this stage of the proceedings since "there is as yet no concrete controversy regarding the application" of the court of appeals decision. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1979).

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[26] The petitioner in the companion case, *Midlantic National Bank v. New Jersey Department of Environmental Protection*, No. 84-801, advances the same argument. (Midlantic Br. 11-16).

This conclusion is particularly compelling in the present context because this Court has often observed that no "set formula" has been developed "for determining when justice and fairness require that economic injuries caused by public action must be deemed a compensable taking," and therefore "the inquiry into whether a taking has occurred is essentially an 'ad hoc, factual' inquiry." *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. at 2874, citing *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

B. Valid Government Regulations which Cause Significant Economic Loss Do Not Violate the "Takings Clause" of the Fifth Amendment.

This Court has consistently rejected challenges to legitimate government regulations under the takings clause, even where compliance would result in the complete destruction of the value of the company's property. Moreover, this Court has done so in cases that by no stretch of the imagination involve the potentially catastrophic consequences to public health and safety involved here.

In *Ruckelshaus v. Monsanto*, the manufacturer of pesticides argued that federal regulations that could result in the public disclosure of trade secrets, thus completely destroying the value of the company's property, violated the takings clause of the fifth amendment. This Court rejected Monsanto's argument and declared that the burdens of government regulation were particularly justified in the sale and use of pesticides, which had long been the subject of public concern and governmental regulation. The economic burdens that accompany government regulation are the price we pay for "the advantage of living and doing business in a civilized community." 104 S. Ct. at 2875 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 422 (1922) (Brandeis, J., dissenting)).

Similarly, in *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), this Court upheld a local safety ordinance which prohibited a sand and gravel company from excavating below the water table, a level it had previously reached. This Court did so even though

compliance with the ordinance would result in a complete prohibition of the beneficial use to which the property had been devoted for the preceding thirty-five years and meant the total destruction of the business enterprise. In rejecting the company's "takings clause" argument, this Court quoted *Mugler v. Kansas*, 123 U.S. 623, 669 (1887), as authority for the proposition that

> [t]he power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not — and, consistently with the existence and safety of organized society, cannot be — burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.

Goldblatt, 369 U.S. at 593.[27]

The trustee's suggestion that requiring the estate to comply with federal and state public health and environmental laws would violate the takings clause with respect to the creditors' property interest in the estate does not withstand scrutiny. Contrary to the trustee's contention, compliance with the federal and state regulations which are at issue here does not necessarily extinguish any property right held by the creditors. Under the ruling of the court below, unsecured creditors (who of course have no protected interest in the estate) can still look to the general assets remaining in an estate and secured creditors can still look to specific property that secures their claim. Therefore, this case is unlike *United States v. Security Industrial Bank*, where the very lienhold interest would have been retroactively extinguished.

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[27] This Court has routinely rejected similar challenges to generally applicable state regulation which caused expenditure of funds or severe economic loss. *See, e.g., Agins v. City of Tiburon* (municipal zoning ordinances restricting the type and density of buildings held not a taking); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) (landmark preservation ordinance); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (industrial zoning regulation); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (municipal ordinance prohibiting brickmaking).

The creditors' real concern in this matter is not with the issue of compliance with legitimate government regulations *per se*, or with the actual extinguishing of a property right; rather, they are concerned, in practical terms, that after compliance with the law there will be significantly less value in the general assets of the estate and less value in the secured property, possibly none at all, to satisfy their claims.[28] Creditors, however, advance funds with the hope of a profitable return but with full knowledge that the business enterprise they are underwriting may fail for any one of a number of reasons, including the cost of their debtor's compliance with public health and environmental regulations. *See also In re T.P. Long Chemical Inc.*, 45 Bankr. at 287 ("Creditors must generally bear the risks of any enterprise."). That is the risk that every creditor voluntarily undertakes in extending credit, *i.e.*, that its debtor may need to expend *some* of its resources to obey laws governing its business. Any creditor of a business such as Quanta's assuredly had a "reasonable investment-backed expectation," *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. at 2875, that Quanta might need to spend money to comply with generally applicable environmental laws in effect at the time of the borrowing which plainly regulated the very essence of Quanta's business.

What the court below held, in effect, was that the creditors' security interests simply do not require the public to underwrite the risks those creditors knew of and must have assumed. In other words, government is not obligated to expend public funds to

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[28] It is well established that unsecured creditors may only look to the unencumbered assets of the estate, if there are any, to satisfy their claims. *See Hanover National Bank v. Moyses*, 186 U.S. 181 (1902). Without the benefit of factual findings it is more difficult to address the issue of secured creditors. The status of Midlantic National Bank, the petitioner in the companion case, *Midlantic National Bank v. New Jersey*, No. 84-801, is illustrative. Although Midlantic asserts the status of a secured creditor, its secured interest does not reside in any definable piece of property but rather consists of the debtor's "inventory," *i.e.*, salable waste oil to the extent that any exists and in "accounts receivable" to the extent that such accounts may exist. *See* Midlantic Br. 6-7. Compliance with government regulations does not destroy Midlantic's rights as a secured creditor. It only diminishes the value of that property.

meet the regulatory obligations of private parties (here, the estate and the trustee in his representative capacity) in order to cushion the creditors' foreseable risk on their investments. That, in general terms, parallels the very conclusion Congress reached in enacting numerous environmental laws during the past decade.

C. Neither *United States v. Security Industrial Bank* nor the "Erosion Taking" Doctrine Permits Abandonment Here.

As demonstrated above, state enforcement of federal and state environmental laws, even when it causes the complete destruction of the value of the property, is not a "taking" under the fifth amendment. Neither *United States v. Security Industrial Bank* nor the "erosion taking" doctrine alters this conclusion.

In *Security Industrial Bank*, this Court considered a challenge under the takings clause to the retrospective application of section 522(f)(2) of the Bankruptcy Code to invalidate liens acquired before the effective date of the Bankruptcy Reform Act of 1978. It held that when there is "substantial doubt whether the retroactive destruction of the appellees' liens in this case comports with the Fifth Amendment," 459 U.S. at 78, it would consider as a matter of statutory construction whether section 522(f)(2) must necessarily be applied in that manner. *Id.* It considered the statutory question first under the basic principle set forth in *Crowell v. Benson*, 285 U.S. 22, 62 (1932), that "this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided."

Here, however, the trustee has failed to demonstrate "substantial doubt" that enforcement of federal and state environmental laws raises a taking question. The *only* cases cited by the trustee or the dissent in the court below in support of their contention that limiting the power of the trustee to manage or abandon the property where it would harm the public interest are the "erosion taking" cases. (T. Br. 21 n.5); *Quanta*, 739 F.2d at 924-26 (Gibbons, J., dissenting) (App. A, 28a-32a). As the court below recognized, however, this doctrine is limited to railroad reorganization cases and requires a balancing of losses to the estate

against the public interest. *Quanta*, 739 F.2d at 922 n.11 (App. A, 23a n.11). The trustee has failed to show that any potential losses to the estate necessitated by protecting the public from leaking chemicals and possible fires would cause "losses unreasonable even in light of the public interest." *Regional Railroad Reorganization Act Cases*, 419 U.S. 102, 124 (1974).

CONCLUSION

For all the foregoing reasons, this Court should affirm the order of the Court of Appeals for the Third Circuit.

Dated: June 7, 1985
New York, New York

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